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January 30, 2003

**Ex Parte**

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th H Street, SW, Portals
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98*; and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147

Dear Ms. Dortch:

The attached letter from William Barr of Verizon was provided to Chairman Powell today. Please place it on the record in the above proceeding. Please let me know if you have any questions.

Sincerely,

Attachment

cc: Commissioner Abernathy
Commissioner Adelstein
Commissioner Martin
Commissioner Copps
W. Maher
J. Carlisle
B. Tramont
C. Libertelli
M. Brill
D. Gonzalez
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January 30, 2003

Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

This letter explains why the Commission should not modify its rules limiting the ability of carriers to substitute unbundled loop-transport combinations (so-called "EELs") for special access services.

***Executive Summary:***

- *First*, the requirement to provide "enhanced extended loops" or "EELs" was originally established as a way to extend the reach of CLECs' local switches in order to provide competing local telephone service. By contrast, as the Commission and the D.C. Circuit have expressly held, special access services for the origination and termination of non-local traffic comprise a distinct and separate market and the Act therefore requires the Commission to undertake a separate, service-specific impairment analysis for special access services. Moreover, as the Commission previously found, special access is a "mature source of competition in telecommunications markets," and competing carriers have not (and cannot) show that they are impaired without access to unbundled elements to provide special access. In the absence of such a showing, the Commission recognized that substituting EELs for special access would be inconsistent with the Act, "undercut the market position of many facilities-based competitive access providers," and threaten revenues that ILECs depend on to support the local network. The D.C. Circuit expressly upheld the Commission's analysis, and pointedly suggested that such a service-specific analysis is required by the express terms of the Act. According to the Court, "it is far from obvious . . . that the FCC *has the power* without an impairment finding as to *nonlocal services* to require that ILECs provide EELs for such services."

- *Second*, based on this analysis, the Commission determined that EELs should be available only to carriers providing "a significant amount of local exchange service" over that facility. It also adopted three alternative tests for satisfying this standard that had been proposed by a cross-industry group of CLECs and ILECs. The dual lynchpins common to these tests were specific, objective criteria for what constituted a significant amount of

local exchange traffic, and a prohibition on the "commingling" of unbundled elements (such as loops) with special access services (such as special access transport). These specific tests also were expressly upheld by the D.C. Circuit, which rejected claims the rules were not administratively feasible, relying on evidence provided by the FCC that carriers were taking advantage of the availability of EELs. Indeed, in Verizon's case alone, CLECs have obtained more than 400,000 voice-grade equivalent circuits as EELs, including more than 200,000 in the last year. The Court also expressly affirmed the commingling restriction as "the only way to prevent carriers from using [EELs] 'solely or primarily to bypass special access services,'" because the absence of such a restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops."

- *Third*, in the wake of the D.C. Circuit decision, other parties appear to concede that restrictions on the availability of EELs are required, but have filed a series of recent *ex partes* proposing wholesale changes to the current rules that would make them meaningless. These proposals are based on a false premise: it is simply not true that existing restrictions have prevented CLECs from obtaining access to EELs. As noted, CLECs *have* obtained hundreds of thousands of voice-grade equivalents from Verizon alone. More important, because the "restrictions" that the CLECs have proposed provide no meaningful limit at all, their effect would be to prescribe special access rates at TELRIC, and undercut what the Commission already found to be a mature source of competition. Moreover, the ultimate impact of these proposals would be to create a new high-capacity, business UNE-platform for dedicated services (regardless of service type), with even more deleterious consequences than the current UNE-platform requirement for mass market services. Indeed, the proposals would cost Verizon alone in excess of *$1 billion* in special access revenues annually, with catastrophic consequences for local network investment and for the continued viability of facilities-based competition.

- *Fourth*, to the extent the Commission has any remaining concerns about the ability to use EELs to extend the reach of CLEC switches for local voice service in the absence of an unbundled switching requirement, those concerns can be addressed directly. As we have explained elsewhere and address below, the Commission could adopt a narrow exception to the commingling prohibition to permit CLECs to connect analog voice grade loops used to provide competing local telephone service to special access transport. Likewise, to the extent the Commission has a concern about potential abuse of the auditing rights provided by its rules, which Verizon has never invoked, it can address any such concerns directly. What the Commission should *not* do is modify the existing EELs restrictions more broadly, without first subjecting the details of any proposed changes to public comment and thoroughly exploring the ramifications of any modification. Even small changes to the existing rules likely will have large and unintended consequences. But it is impossible for parties to comment intelligently (and, therefore, for the Commission to make an informed decision), without first knowing what, if any changes, are under consideration and without knowing what elements have to be made available in the first place.

***Discussion:***

### *1. Background: EELs Are Intended To Extend the Reach of CLEC Local Switches, Not To Facilitate Special Access Bypass*

EELs are combinations of unbundled local loops and unbundled dedicated transport that provide a link between a requesting carrier's collocated facilities in one wire center and a customer served out of a distant wire center. The EEL requirement reflected regulators' interest in providing a way for competitors to extend the reach of their switches for the provision of local exchange service without the need to establish additional collocation arrangements. As the NYPSC put it, by permitting CLECs access to EELs, "CLECs with at least some network facilities [are able] to gain access to unbundled local loops in many central offices without the need to collocate in each . . . central office, thereby enhancing CLECs' ability to vie for local customers."[1] The explicit justification for requiring access to EELs was that it would spur the "development of facilities-based *local* competition . . . principally geared toward . . . residential and smaller business markets."[2]

In the *UNE Remand Order* proceeding, the Commission likewise noted that the purpose of EELs was to "extend[] a customer's loop from the end office serving that customer to a different end office in which the competitor is already collocated" thus permitting the carrier to "transport[] aggregated loops over efficient-high capacity facilities *to their central switching location.*" *UNE Remand Order*, 15 FCC Rcd 3696, ¶ 288 (1999) (emphasis added). The Commission limited access to these loop-transport combinations to *only* those circumstances where such arrangements would be used to provide a "significant amount of local exchange service in addition to exchange access service, to a particular customer."[3]

At the same time, the Commission refused to require ILECs to make EELs available solely or primarily for use in the provision of special access service.[4] That determination was firmly grounded in the recognition that the special access market is separate and distinct from the local exchange market. Indeed, the "exchange access market occupies a different legal category from the market for telephone exchange service." *Supplemental Order Clarification* ¶ 14. And, as the Commission has found, the market for special access has become highly

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[1] Order Directing Tariff Revisions, *Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements*, Case 98-C-0690, at 2 (N.Y. Pub. Serv. Comm'n Mar. 24, 1999).

[2] *Id.* at 7-8 (emphasis added); *see also* 8, n.5 ("EEL arrangements potentially offer CLECs an important additional means of executing a plan to enter the *local exchange* market.") (emphasis added).

[3] *Supplemental Order*, 15 FCC Rcd 1760, ¶ 5 (1999).

[4] *Id.* at ¶ 4; *see also Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 8 (2000).

competitive in the absence of access to UNEs. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Id.* ¶ 18. Special access customers are characteristically large businesses with high traffic volumes – voice, data, or both – justifying dedicated point-to-point facilities to carry traffic to IXCs' or ISPs' points of presence. Competitors have captured at least 36 percent of that market. In light of that record, the FCC concluded that there was no evidence that competitors are impaired in their ability to provide special access without access to unbundled loops and transport. *Id.* ¶ 15. Far from promoting competition, permitting requesting carriers to substitute UNEs for special access would "undercut the market position of many facilities-based competitive access providers." *Id.* ¶ 18. Moreover, such special-access bypass would cause "substantial market dislocations," threatening to eliminate ILEC special access services, thereby jeopardizing an important source of revenues that help to support the local network. *Id.* ¶ 7.

The crucial legal determination in the *Supplemental Order Clarification* is that section 251(d)(2) should be read to require a *service specific* analysis to determine whether a requesting carrier would be impaired in its ability "'to provide *the services that it seeks to offer.*'" *Id.* ¶ 15 (quoting 47 U.S.C. § 251(d)(2)(B)).[5] The Commission found that the parties had presented no evidence that carriers would be impaired in the provision of special access service in the absence of access to EELs. *See id.* ¶ 16. The Commission rightly determined that it could not "impose [unbundling] obligations first and conduct our 'impair' inquiry afterwards." *Id.* Rather, the burden is on requesting carriers affirmatively to demonstrate impairment *in the provision of special access service* to justify unbundling of UNEs for the provision of such service – something that they have not and cannot do.

The D.C. Circuit expressly upheld this analysis in its *CompTel* decision. The Court first upheld the Commission's determination to conduct a service-specific impairment analysis. The Court agreed that, in conducting its impairment analysis, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel v. FCC*, 309 F.3d 8, 13 (2002). Indeed, the Court indicated that such a service-specific inquiry is not merely permitted, but *required* in this case: "it is far from obvious . . . that the FCC *has the power* without an impairment finding as to non-local services, to require that ILECs provide EELSs for such services." *Id.* The Court agreed that there was no evidence to suggest that requesting carriers are impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements. *Id.* And the Court likewise found that the Commission's concerns about market

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[5] *See also UNE Remand Order* ¶ 81 (holding that, because "[d]ifferent types of customers use different *services* . . . it is appropriate for us to consider the particular types of customers that the carrier seeks to serve")(emphasis added); *Line Sharing Order*, 14 FCC Rcd 20912 ¶ 31 (1999) (reiterating conclusion that "it is appropriate to consider the *specific services* and *customer classes* a requesting carrier seeks to serve when considering whether to unbundled a network element")(emphasis added).

dislocations and undermining the market position of facilities-based competitors provided further justification for its restrictions. *Id.* at 16.

### *2. The Existing Restrictions Should Not Be Changed*

In an effort to give content to its determination that unbundled loop-transport combinations should be made available only for use to provide a "significant amount of local exchange service," the Commission set out three sets of circumstances under which a carrier would satisfy that requirement. *Supplemental Order Clarification* ¶ 22.

These existing "safe harbors" were the result of negotiations by a broad cross-section of the telecommunications industry, including both ILECs and CLECs. The criteria include requirements designed to ensure that the EELs are being used to connect to the CLEC's local switch rather than an IXC or ISP POP – the purpose of the collocation requirement – as well as traffic volume requirements designed to ensure that the EELs are being used predominantly for local traffic, not just long-distance traffic. *Id.* ¶ 22. In addition, the Commission adopted a prohibition on "commingling," a term it used to refer to the combining of unbundled elements (such as loops) with special access services (such as special access transport circuits). *Id.* ¶ 28. The purpose for this provision was to ensure that each of a carrier's customers satisfies the substantial local usage requirement and to prevent all special access channel terminations from being immediately converted to unbundled loops at TELRIC rates. *Id.*

Moreover, the D.C. Circuit specifically upheld the Commission's safe harbors, rejecting claims that the restrictions were not administrable. The court held that "it is plain that supplying the information is feasible, as the Commission has produced evidence that some carriers are taking advantage of the safe harbors." *CompTel*, 309 F.3d at 17. The Court likewise agreed with the FCC that the commingling restriction is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" and that the absence of such a restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id.*

Despite the Commission's earlier decision – and the D.C. Circuit's approval of that decision – CLECs again argue that the current restrictions must be changed because they are overly restrictive and have prevented them from obtaining EELs. But experience proves that carriers can and do take advantage of the current safe harbors to gain access to EELs. Verizon alone has provisioned more than 400,000 voice-grade equivalent circuits as unbundled loop transport combinations – more than 200,000 in the last year alone. More than a dozen CLECs, large and small, have converted special access circuits to EELs.

Indeed, if anything, the current safe harbors are not restrictive enough and allow circuits to be "flipped" to sub-competitive TELRIC pricing even when they are used predominantly for exchange access service, rather than local exchange service. Some requesting carriers have gamed the existing rules by self-certifying compliance with the Commission's safe harbors, even in circumstances where the circuits at issue on their face did not satisfy the clear requirements of the Commission's rules. *See, e.g., Net2000*

*Communications, Inc. v. Verizon Washington, D.C. Inc.*, 17 FCC Rcd 1150 (2002). In the *Net2000* case, the requesting carrier sought conversion of existing special access circuits, and "certified that the circuits provided 'a significant amount of local exchange service to the particular customers served.'" *Id.* at ¶ 11. Verizon did not convert the circuits because the request on its face did not "conform to the Commission's requirements." *Id.* After the requesting carrier brought a formal complaint, the Commission vindicated Verizon and held that the requesting carrier's certification was improper. As the Commission held, "the requested circuits were . . . ineligible for conversion" and thus the carrier's request for conversion "in conflict with [the Commission's] co-mingling restriction was inappropriate." *Id.* ¶ 33.

Notably, *Verizon's* record of compliance with the Commission's rules on this score is unblemished, and whenever Verizon's practices in this regard have been challenged – formally or informally – Verizon has prevailed. Moreover, while some parties have complained that incumbents might abuse the existing rules that permit audits to verify compliance with the Commission's rules, Verizon has never invoked that right. Thus, while the audit right is important to protect against abuse by requesting carriers, any suggestions that *Verizon* has abused that right are simply fabrications.

Carriers also have objected to the existing safe harbors because they prevent requesting carriers from using unbundled loop-transport combinations to establish dedicated connections to IXC or ISP POPs. But that provides no basis for criticizing the existing rules; to the contrary, the very purpose behind the restrictions is to ensure that EELs are not used simply as a TELRIC-priced substitute for special access.

In short, actual experience under the existing rules has provided firm empirical evidence that the rules do not prevent carriers from obtaining EELs. To the contrary, that experience demonstrates that, if anything, the restrictions are too lax; carriers have gamed the existing rules to obtain access to EELs without providing local services or connections to the switched local network. Too often, EELs have simply been used simply as a new high-capacity, dedicated UNE-platform for large businesses. And such use of EELs is inconsistent with the purpose for which those facilities are intended and undermines, rather than promotes, facilities-based local competition.

### *3. Proposals to Change the Existing Rules Would Impose No Meaningful Limits At All, And Would Destroy a Working Competitive Market*

As outlined above, EELs were originally conceived as a way for new entrants to extend the reach of their local switches in order to promote competing local voice services, particularly in the residential and small business markets. As a purely legal matter, a finding that EELs should be made available for *those services* does *not* permit EELs to be made available to carriers seeking to establish dedicated connections for non-local traffic being carried to IXC POPs, or delivered to ISPs. *Supplemental Order Clarification* ¶ 16. Rather, the Commission must carry out a service-specific impairment analysis *before* EELs can be made more widely available.

Because they cannot demonstrate that they would be impaired in the provision of special access services without access to EELs, CLECs now try to avoid that fundamental principle by instead proposing changes to the existing rules that would ostensibly be easier to administer. But those proposals work far more than mere "administrative" changes. They fail to impose *any* meaningful limitations on access to EELs; if adopted, those proposals would effectively prescribe TELRIC rates for special access services and would violate the Act.

Some parties have claimed that the only limitation that is needed is a requirement that an EEL terminate in a requesting carrier's collocation arrangement. To be sure, because EELs were intended to extend the reach of a CLEC's local switch, the Commission should require, as it currently does, that an EEL terminate in a collocation arrangement *and* that CLECs certify that the traffic received over the EEL is predominantly local traffic routed to the CLEC's local switch. But the requirement that an EEL terminate in a collocation arrangement, standing alone, does not impose a significant limitation – large carriers already have nearly ubiquitous collocation arrangements, already terminate a significant portion of their special access circuits to collocation arrangements, and could readily reconfigure the rest to do so. The result would be TELRIC priced special access.

Likewise, a requirement that a requesting carrier assign a local number to a circuit, or provide a porting capability or a local voice capability would pose no meaningful limitation on special access bypass. At most, any such requirements may mean that some part of a circuit might be capable of providing local service. They do not require a substantial amount of local traffic, which is an absolute prerequisite to EEL use under the impairment analysis. And requiring the assignment of a local number is meaningless. First, CLEC misuse of local number resources is well established, and would provide no check on gaming. Second, such a rule is simply inadequate. For example, assigning a single telephone number to a DS-3 or DS-1 would appear to be sufficient to convert it to TELRIC pricing under the CLECs' proposals.

CLECs' remaining criteria are window dressing, not meaningful limitations related to the use of a particular facility. Essentially all carriers that purchase special access, including AT&T, WorldCom and others, already have state certificates of authority, PSAP 911 certificates, interconnection agreements, and local interconnection trunks. None of these indicia that a carrier might carry local traffic somewhere in a jurisdiction answer the question required under the impairment analysis: does the EEL in question carry a substantial amount of local traffic. These requirements would create no meaningful obstacle to special access bypass.

The Commission should also reject proposals for abandoning the prohibition on commingling, *i.e.*, combining unbundled elements with special access. Absent this restriction, as the Commission and D.C. Circuit have expressly found, carriers would be able to convert the entire base of special access channel terminations into unbundled local loops to be provided at UNE rates. *See CompTel*, 309 F.3d at 17-18. As the Commission previously recognized, the consequences would be disastrous both for ILECs and for the future of facilities-based competition in this mature segment of the market.

Adopting the recent CLEC proposals would thus ignore the clear guidance of the D.C. Circuit, which has firmly endorsed both the Commission's existing restrictions and the policy considerations that underlie those rules. Moreover, such a policy would create a new UNE-platform for high-capacity dedicated services and "induc[e] IXCs to abandon [special and] switched access for unbundled network element-based special access on an enormous scale." *Supplemental Order Clarification* ¶ 7. The ramifications of such a policy for investment incentives and the health of the industry would be even more severe than with the current mass market UNE-platform requirement, because there is already a mature, competitive market in special access. Moreover, permitting special access bypass would eliminate a critical source of revenues that help pay for the cost of operating, maintaining, and upgrading local telephone networks to provide broadband and other new service capabilities. Allowing access to existing special access facilities at UNE prices thus serves no competitive purpose under the Act, and in fact injures facilities-based competition by undercutting existing facilities-based providers. Indeed, imposing an unbundling obligation for special access services would create a vicious cycle by undercutting existing facilities-based providers, deterring carriers from deploying new facilities, and, by doing so, indefinitely perpetuate both unbundling and regulation.

If the new CLEC proposals prove anything, it is that the Commission should not make any significant modifications to the existing EELs restrictions until the parties have had a chance to debate these and other proposals fully. Unlike the Commission's unbundling rules – which the Commission is required to revisit in light of the D.C. Circuit's decision in *USTA* – the Commission's existing restrictions on special access bypass have been *upheld* by the D.C. Circuit in *CompTel*. The Commission is under *no* obligation to modify those rules, which are indisputably consistent with the 1996 Act. Accordingly, the Commission should not rush to modify existing rules at the risk of opening the door to special access bypass on a massive scale. The ramifications of such a development – for incumbents, for facilities-based competitive access providers, and for local network investment – would be devastating.

Moreover, as noted above, to the extent the Commission has any remaining concerns about the ability to use EELs for their intended purpose, they can be addressed directly. In particular, the Commission could adopt a narrow exception to the commingling prohibition in its current rules to permit CLECs to connect single channel analog voice grade loops to special access transport. This would provide CLECs with another alternative (in addition to those already available) to extend the reach of their switches to customers in distant wire centers by obviating the need for collocation in the wire center serving the unbundled voice grade loops. If the Commission does so, however, it is critical to prevent gaming by making clear that the substantial local use standard applies to any such standalone loops, and by requiring a certification that the loop terminates on a CLEC switch which is used for originating and terminating local voice calls. Moreover, the Commission should make clear that the special access transport circuit is not subject to TELRIC pricing under these circumstances – which is sometimes referred to as "ratcheting." On the contrary, even the CLECs have conceded that ratcheting is unnecessary. *See* Transcript of Oral Argument, *CompTel v. FCC,* Case No. 00-1272 at 20 (D.C. Cir. Sept. 5, 2002) (Counsel for Intervenors WorldCom et al. ("Now we're not trying to convert the transport link. We'll pay full access

rates for that, so there's no chance that we can cheat. We're talking about only wanting to convert local loops").

Likewise, to the extent the Commission has any concerns about possible abuse of the audit rights in its existing rules, it can address any such concerns directly as well. As noted above, Verizon has never even invoked its audit rights, and any such concerns are unfounded in our case. To the extent there are concerns about specific practices of other parties, however, any such concerns can be addressed without a wholesale abrogation of the existing rules.

What the Commission should *not* do (and cannot do consistent with the Act's impairment standard), however, is modify the existing restrictions more broadly without first airing the details of any proposed changes so that parties can comment fully on the ramifications for the competitive special access market. This is an area where even small changes will likely have large, unanticipated, and unintended consequences. And the cost of getting it wrong is enormous, both in terms of the consequences for local network investment and for the continued viability of facilities based competition in a mature segment of the market.

Sincerely,

William P. Barr

cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Commissioner Adelstein
W. Maher
C. Libertelli
M. Brill
J. Goldstein
D. Gonzalez
L. Zaina